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Supreme Court, U.S.
FILED
NOV 24 1997
CLERK

No. 97-721

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

COUNTY OF SAN JOAQUIN, ET AL.
Petitioners,

v.

STATE WATER RESOURCES CONTROL BOARD, ET AL.
Respondents.

On Petition for Writ of Certiorari
to the California Court of Appeals
for the Third Appellate District

BRIEF IN OPPOSITION OF RESPONDENTS, THE STATE WATER RESOURCES CONTROL BOARD AND ITS MEMBERS

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
CHARLES W. GETZ, IV
Assistant Attorney General
CLIFFORD T. LEE
LINUS MASOUREDIS
(Counsel of Record)
Deputy Attorneys General
2101 Webster Street, 12th Floor
Oakland, California 94612-3049
Telephone: (510) 286-1263
Facsimile: (510) 286-4020

Attorneys for Respondents, the State Water Resources Control Board and Its Members

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QUESTIONS PRESENTED

1. Whether the United States Bureau of Reclamation ("Bureau") was an indispensable party under California Code of Civil Procedure section 389(b) thereby necessitating dismissal of a California state court action for failure to join the Bureau where: (1) the state court action sought changes in the terms and conditions of the Bureau's water right permits for the Central Valley Project ("CVP") that were prejudicial to the interests of the United States; (2) no other party could adequately represent the interests of the Bureau; (3) a pending federal court action against the Bureau by some of the plaintiffs in the state court action alleged many of the same claims that were alleged in the state court action thereby affording plaintiffs an alternative remedy; and (4) the United States invoked its sovereign immunity, and refused to consent to suit against the Bureau in state court.

2. Whether California trial court determinations about indispensable parties under California Code of Civil Procedure section 389(b) are subject, on appeal, to an abuse of discretion or a *de novo* standard of review.

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BRIEF IN OPPOSITION OF RESPONDENTS, THE STATE WATER RESOURCES CONTROL BOARD AND ITS MEMBERS

Respondents, the State Water Resources Control Board and its individual members, John P. Caffrey, Marc Del Piero, James M. Stubchaer, Mary Jane Forster and John W. Brown (collectively, the "SWRCB") hereby respond to the Petition for Writ of Certiorari ("Petition"), and respectfully request that the Petition be denied.

JURISDICTION

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. section 1257(a). However, no substantial federal question was either decided by, or properly presented to, the California courts below. Consequently, for either prudential or jurisdictional reasons, the Court should decline to entertain any of the purported federal questions presented in the Petition.

STATEMENT

1. The United States Bureau of Reclamation ("Bureau") owns and operates the Central Valley Project ("CVP") in California, the largest reclamation project in the Nation. Pet. App. 4.[1/] The CVP includes New Melones Dam on the Stanislaus River. *Id.* at 5. Some of the petitioners have water supply contracts with the Bureau for New Melones water. *Id.* at 5-6; 43-45. Other petitioners are downstream diverters who have riparian water rights that are allegedly affected by New Melones operations. *Id.*

Petitioners filed a petition and complaint ("complaint") in California superior court against the SWRCB seeking to: (1) invalidate WR 95-6, a water right order of the SWRCB

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1. "Pet." refers to the Petition for Writ of Certiorari; "Pet.App." refers to the Appendix to the Petition; "CT" refers to the Clerk's Transcript on Appeal in the California courts.

which amends some of the terms and conditions in the water right permits of the Bureau, including those for New Melones, CT 2, ¶1(a); 6, ¶21; 8-10, ¶¶26-28; (2) compel the SWRCB to prohibit other CVP operations which are not covered by WR 95-6, CT 3, ¶1(b), 31-41; and, (3) obtain a declaratory judgment prescribing how the SWRCB should apply certain California water laws to the Bureau in future water right proceedings. CT 3, ¶2; 48-49, 51-53. The complaint named the Bureau as a Real Party in Interest. CT 5, ¶19.

After it was served with the complaint, the Bureau appeared specially, and asserted that the California superior court lacked jurisdiction over it by virtue of the sovereign immunity of the United States. CT 664-672. The SWRCB and others then moved to dismiss the action on the ground that the Bureau was an indispensable party under California Code of Civil Procedure section 389 which could not be joined in the action. CT 688-710, 1762-1788.

The superior court applied the factors listed in Code of Civil Procedure section 389(b), and ruled that: (1) the Bureau's interests would be substantially prejudiced if the action proceeded without it; (2) there was a risk of contradictory legal obligations and further litigation if the action proceeded without the Bureau because of a pending federal court action against the Bureau which raised many of the same state law claims alleged in the state court action; (3) some of the petitioners were also plaintiffs in that pending federal court action which provided them an adequate alternative remedy; and, (4) the State of California could not adequately represent the Bureau's interests in the state court action. Pet. App. 23-25. The superior court then dismissed the action on the ground that the Bureau was an indispensable party that could not be joined. Pet. App. 151-153.

Petitioners' opening brief in the California court of appeal framed the issue on appeal as follows:

> "The sole issue in this appeal is whether the United States is an indispensable party under the statutory definition of Code of Civil Procedure §389."

> Appellants' Opening Brief, p. 10, l. 15-17. (Emphasis added).

The California court of appeal similarly stated:

> "The sole issue presented in this appeal is whether the trial court erred in finding the Bureau was an indispensable party, thereby necessitating dismissal of this action." Pet. App. 7.

The court of appeal first ruled that the superior court's indispensable party determination under Code of Civil Procedure section 389(b) should be reviewed under an abuse of discretion rather than a *de novo* standard. Pet. App. 7. In resolving this standard of review issue, the court of appeal referred to the language of section 389(b) which refers to determinations "in equity and good conscience", and the California state court decisions which describe the discretionary nature of indispensable party determinations. Pet. App. 11. The court of appeal then went on to note that because Code of Civil Procedure section 389 had been amended to conform to rule 19 of the Federal Rules of Civil Procedure, it was appropriate to use federal precedents "as a guide to application of [Code of Civil procedure section 389]." [quoting *Kraus v. Willow Park Public Golf Course*, 73 Cal.App.3d 354, 368 n. 9 (1977). (Emphasis added). Pet. App. 12. The court of appeal noted that all of the Federal circuit courts except the Sixth Circuit had concluded that the abuse of discretion standard governed indispensable party determinations under Fed.R.Civ.Pro. 19(b). Pet. App. 12-13, n. 5.

The court of appeal also rejected petitioners' contention that if dismissal of an action for non-joinder of an indispensable party would leave a litigant without an alternative remedy, the action could not be dismissed. Pet. App. 14-16. Instead, the court of appeal concluded that the lack of an alternative remedy was one of several factors to be considered under Code of Civil Procedure section 389, and that how the balance among these factors was struck depended upon the facts and circumstances of each particular case. *Id.*

at 16.

The court of appeal went on to find that it was "not convinced [that] [petitioners] lack an alternative forum." *Id.* at 16. The court of appeal described the overlap between petitioners' federal court action against the Bureau, and the state court action before it. *Id.* at 17-18. The court of appeal pointed out that, "the federal case challenges the Bureau's Central Valley Project operations and seeks to change the Bureau's operations of New Melones and the Central Valley Project to make more water available to [petitioners], which is the same general type of relief sought in the instant case." Pet. App. 17, n. 7. The court of appeal also thought that petitioners' argument that the Bureau would not be prejudiced if the state court action proceeded without the Bureau was "preposterous". *Id.* at 20, n. 11. Finding no abuse of discretion in the trial court's balancing of section 389(b) factors, the court of appeal affirmed the dismissal of the action.

Petitioners then sought review in the California Supreme Court. In accordance with California Rule of Court 28(e)(2), petitioners' Petition for Review to the California Supreme Court set forth the specific issues that petitioners tendered for review. Under Rule 28(e)(2), these are the only issues that need be considered by the California Supreme Court. E.g., *People v. Gionis*, 9 Cal.4th 1196, 1221, n. 19 (1995). The Petition for Review did not identify any federal constitutional or statutory issues for review. Instead, the Petition for Review stated the following under "Issues Presented for Review":

> "The primary issue presented for review is whether a trial court's determination of indispensability of a non-joined party pursuant to Code of Civil Procedure §389(b) is subject to de novo review, or is subject to review for an abuse of discretion. Alternatively, is it an abuse of discretion to dismiss a petition for writ of mandate for review of a decision of the State Water Resources Control Board or other state agency based on the unavailability of the federal

> government as an interested party, where such dismissal results in no judicial review of the decision of the Board (contrary to Water Code § 1360, currently Water Code § 1126), and no judicial review under the California Environmental Quality Act?"
>
> "Within the context of these issues are two substantial issues presented by the circumstances of this case:"
>
> "A. May judicial review of water right proceedings before the State Water Resources Control Board ("Water Board"), as well as judicial review of California Environmental Quality Act ("CEQA") proceedings before other public bodies and other administrative proceedings, be entirely avoided in all cases in which the federal government is an interested party and it refuses to waive its sovereign immunity?"
>
> "B. Must the specific provisions of Water Code § 1360 (currently Water Code § 1126), providing a right of review of Water Board decisions, and the right to obtain review in CEQA proceedings pursuant to Public Resources Code § 21168 and Code of Civil Procedure § 1094.5, give way to the general provisions regarding indispensable parties set forth in Code of Civil Procedure § 389(b)?" Petition for Review by County of San Joaquin, et al., pp. 1-2. (Emphasis added.)

Thus, in addition to the standard of review issue, the only issues presented to the California Supreme Court were whether the indispensable party determination: (1) was an "abuse of discretion" and (2) conflicted with a state law right to a court hearing under the California Water Code and the California Environmental Quality Act.

The California Supreme Court denied review without comment. Pet. App. 1.

2. In dismissing the action because of the inability to join the Bureau, the superior court and court of appeal relied on the fact that petitioners Stockton East Water District, Central San Joaquin Water Conservation District and the County of San

Joaquin had filed a federal court action against the Bureau entitled *Stockton East Water District et al. v. United States et al*, No. CV-F-94-6103-OWW (U.S.D.C. E.D. Cal.). See Pet.App. 9-10, 17-18, 24. The *Stockton East* complaint in federal court raises many of the same claims that were raised in this state court action.[2/] The *Stockton East* complaint also sought similar relief, namely, requiring the Bureau to make more New Melones water available either to satisfy petitioners' water supply contracts or to increase flows past their riparian property. CT 926-930.

Petitioners can assert their state law claims against the Bureau in federal court because section 8 of the Reclamation Act of 1902, 43 U.S.C. section 383, requires the Bureau to comply with California law in the control, appropriation, use, and distribution of CVP water if California law is not inconsistent with clear congressional directives. See *California v. United States*, 438 U.S. 645, 672-675 (1978). Consequently, rather than sue the SWRCB and claim that the SWRCB wrongly allowed the Bureau to operate in violation of state law, petitioners can sue the Bureau directly in federal court under section 8 of the Reclamation Act for the same allegedly illegal CVP operations.

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2. See, for example, the claims that: 1) the Bureau's use of New Melones water to comply with the Principles for Agreement deprives appellants of their contract rights with the Bureau, compare CT 26-27, 38-39 (state court petition, ¶¶70-72, 115, 116), with CT 905-911 (federal complaint, ¶¶49-51, 71, 73); 2) the Bureau violated the Watershed Protection Act, Cal. Water Code §§11460 et seq., compare CT 31-35 (state court petition, 9th cause of action), with CT 919-921 (federal complaint, 8th cause of action); 3) the Bureau is violating the California Constitutional prohibition against unreasonable use of water, compare CT 40-42 (state court petition, 12th cause of action), with CT 921-923 (federal complaint, 9th cause of action); and, 4) the Bureau has violated restrictions on use in its water right permits for the New Melones Dam, compare CT 35-37 (state court petition, 10th cause of action), with CT 917-918, 923-926 (federal complaint, 7th and 10th causes of action).

After the superior court dismissed this action, petitioners Central Delta Water Agency, Reclamation District No. 2072, and R.C. Farms, Inc., who had not joined in the *Stockton East* federal court suit, filed their own federal court action entitled *Central Delta Water Agency, et al. v. United States, et al.*, No.CV-F-96-5738-OWW (U.S.D.C. E.D.Cal.). The *Central Delta* federal court complaint alleged claims against the Bureau that are almost identical to those in this action. The *Central Delta* complaint also named the SWRCB and its individual members as defendants, and alleged a due process claim against them like that in the thirteenth cause of action in this action. The SWRCB was subsequently dismissed as a defendant pursuant to the Eleventh Amendment, but the *Central Delta* action is proceeding against the individual SWRCB members.

ARGUMENT

I. THE DECISION BELOW WAS BASED SOLELY UPON STATE LAW GROUNDS WHICH THIS COURT LACKS JURISDICTION TO REVIEW

Questions 1 and 2 in the Petition present questions regarding indispensable party determinations under Fed.R.Civ.Pro. 19(b). However, the California courts in this case applied state procedural law in California Code of Civil Procedure section 389(b), not the Federal Rules of Civil Procedure. The Superior Court balanced the various fact-intensive factors in Code of Civil Procedure section 389(b), and determined, in the specific circumstances of this case, that the Bureau was an indispensable party. This is a state law question that this Court does not have jurisdiction to review under 28 U.S.C. section 1257(a).

California Code of Civil Procedure section 389(b) is modelled after Fed.R.Civ.Pro. 19(b). See Pet. App. 12. The California court of appeal also looked to federal decisions for guidance in deciding the standard of review for indispensable party determinations under Code of Civil Procedure section 389(b). Pet. App. 12-14. However, that does not convert an indispensable party determination under Code of Civil

Procedure section 389 into a federal question.

In "hybrid" federal-state law situations where state law is interwoven with federal law, the Court has distinguished between situations where a state court feels compelled by federal law to adopt a particular construction of state law (usually to avoid a perceived federal constitutional infirmity), and cases where a state court merely looks to federal law for guidance in construing state law. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (distinguishing situations where "federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached"); *id.* at 1042, n. 7 (need "to determine whether a particular result was guided or compelled by federal law"); *Arizona v. Evans*, 514 U.S. 1, 10 (1995); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 155 (1984) (Supreme Court jurisdiction where it appeared that the state court in construing state law "regarded federal law as an affirmative bar"); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (Supreme Court jurisdiction where "the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did."). This Court has jurisdiction in the former case where a state law interpretation is compelled by federal law, but not in the latter case where federal law is used for guidance purposes. So long as a state court indicates in its decision that federal law is being used for guidance purposes and is not compelling a particular result, the state law issue is one upon which the state courts have final authority. See *Michigan v. Long, supra,* 463 U.S. at 1041.

In this case, the California court of appeal explicitly stated that it was using federal precedents construing Fed.R.Civ.Pro. 19 "as a guide to application of [Code of Civil procedure section 389]", quoting *Kraus v. Willow Park Public Golf Course*, 73 Cal.App.3d 354, 368 n. 9 (1977). (Emphasis added.) See Pet. App. 12. The court of appeal also cited to *Conrad v. Unemployment Insurance Appeals Bd.*, 47 Cal.App.3d 237, 241 (1975), see Pet. App. 12, where the *Conrad* court also explicitly stated that it is appropriate "to

use federal precedents as a guide to application of the statute." (Emphasis added). See also *Copley v. Copley*, 126 Cal.App.3d 248, 296 (1981) (noting that because Code of Civil Procedure section 389 conforms substantially to Fed.R.Civ.Pro. 19, "the cases relating to the federal rule are relevant.") (Emphasis added). California courts, however, remain free to disregard federal precedents under Fed.R.Civ.Pro. 19(b) altogether. This is illustrated by *People ex rel. Lungren v. Community Redevelopment Agency*, 56 Cal.App.4th 868, 885, n.10 (1997) where the California court of appeal noted, but then declined to follow, federal precedents construing Rule 19 in its indispensable party determination under Code of Civil Procedure section 389(b).

While the court of appeal here cited federal Rule 19 precedents for the standard of review, it did so only after first noting that the language of Code of Civil Procedure section 389(b) and the California cases construing section 389(b) indicated an abuse of discretion rather than a *de novo* standard of review. See Pet. App. 11. Thus, federal Rule 19 precedents merely supported the court of appeal's conclusion about the standard of review which was independently based on that court's reading of California case and statutory law.

In their Petition for Review in the California Supreme Court, petitioners also claimed that there was a conflict between state court of appeal decisions on the standard of review for indispensable party determinations. See Petition for Review by County of San Joaquin et al, pp. 3-4; 16-19. While petitioners also claimed that there was a conflict among federal circuit courts over the standard of review under Rule 19(b), petitioners urged that "review [by the California Supreme Court] can resolve the subject state conflict that will be present regardless of whether the federal conflict is ever resolved." *Id.* at 19, l. 2-4. (Emphasis added). Thus, petitioners themselves recognized that any state court conflict over the standard of review under section 389(b) is independent of, and will not be resolved by, resolution of any federal court conflict over the standard of review for Rule 19(b) determinations.

The conclusion that the Bureau was an indispensable party turned on the interpretation of California precedents, mainly *Sierra Club, Inc. v. California Coastal Commission*, 95 Cal.App.3d 495 (1979) and *Vanoni v. County of Sonoma*, 40 Cal.App.3d 743 (1974), not any federal court precedents. In fact, the superior court explicitly stated that *Sierra Club* was "controlling," Pet. App. 24, ¶2, and the court of appeal did not disturb that conclusion. Thus, from the face of the decisions below it is clear that federal court precedents provided guidance only, and that the disposition was controlled by California rather than federal law.

In *Miller's Executors v. Swann*, 150 U.S. 132, 137 (1893) the Court rejected the notion that it had jurisdiction to review a state statute merely because the statute was patterned after, or incorporated, federal standards. The Court used state procedural law patterned after federal rules of procedure as an example:

> "A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice." (Emphasis added)

To "federalize" state law and make it subject to review under 28 U.S.C. section 1257(a) merely because state law is patterned after, or uses language similar to, a federal statute would drastically upset the balance of Federalism. It would diminish the importance of the state courts by eliminating the finality with which they interpret state law, and it would require state legislatures to accept federal judicial supervision as the price for using federal models in their legislative

drafting -- to say nothing of further increasing this Court's already overcrowded docket.

II. NONE OF THE FEDERAL QUESTIONS IN THE PETITION WERE EITHER DECIDED BY, OR PROPERLY PRESENTED TO, THE CALIFORNIA COURTS

With very rare exceptions, this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [this Court] ha[s] been asked to review." *Adams v. Robertson*, 117 S.Ct. 1028, 1029 (1997). Neither the California superior court nor the court of appeal addressed any of the federal law questions presented in the Petition. Instead, those courts treated the issue as one solely of state law of whether the Bureau was indispensable under the statutory criteria of Code of Civil Procedure section 389(b). Because the California courts did not address any of petitioners' federal law claims, petitioners have the burden of demonstrating that those issues were, in fact, properly presented to the California courts. *Adams, supra*, 117 S.Ct. at 1029. Those federal law issues were not presented to the California courts, either properly or otherwise.

First, Supreme Court Rule 14.1(g)(i) requires petitioners to specify in their Petition the portions of the record which establish that their federal questions were presented to the trial and appellate courts. Petitioners have failed to comply with Rule 14.1(g)(i) for every question except their "due process" question. Nowhere in their Petition have petitioners identified where they raised any federal Equal Protection claim below (Question IV), or any claim regarding Section 8 of the Reclamation Act of 1902 (Questions III and VI), or any claim that state court determinations under California Code of Civil Procedure section 389(b) are controlled by federal court decisions construing Fed.R.Civ.Pro. 19(b) (Questions I and II). This alone is enough to deny review of these questions.

Second, while petitioners say that they raised Question

V, their "due process" question in Central Delta's Statement of Issues before the SWRCB, Pet. 11, and in their 13th cause of action in their state court complaint, *id.* at 13-14, these references are to an entirely different due process claim. The due process claim in the Statement of Issues and the 13th cause of action alleged that petitioners were denied due process in the SWRCB proceeding because of alleged *ex parte* contacts that occurred during that SWRCB administrative proceeding. In contrast, the due process claim in the Petition alleges that the dismissal of this state court action because of the inability to join the Bureau is a denial of due process.

Third, petitioners' reliance upon their reply brief in the court of appeal as a basis for having raised the "due process" issue, see Pet. 16-18, is unavailing. Under California law, the court of appeal need not consider issues that are raised for the first time in a reply brief to which the opposing party cannot respond. See e.g., *Dixon v. Board of Trustees*, 216 Cal.App.3d 1269, 1286 (1989) ("it is improper to raise new substantive arguments for the first time in a reply brief and an appellate court has no obligation to address the merits of such arguments."); *Sunseri v. Camperos Del Valle Stables, Inc.*, 185 Cal.App.3d 559, 562 (1986) ("Western World raises several other issues for the first time in its reply brief. As this is improper, we need not address them.") This failure to comply with state procedural rules for the proper presentation of issues is sufficient to preclude review by this Court. See e.g., *Webb v. Webb*, 451 U.S. 493, 498 (1981); *Beck v. Washington*, 369 U.S. 541, 549-554 (1962); *Mutual Life Insurance Co. v. McGrew*, 188 U.S. 291, 309 (1903).

Fourth, none of the references to "due process" that petitioners have identified specify that it is the Due Process Clause of the Federal, rather than California Constitution that is being referred to. Indeed, Questions I, IV and V in the Petition continue to refer vaguely to "Due Process" and "Equal Protection" without specifying the federal nature of either of those claims. Consequently, petitioners have failed the "minimum requirement that it must be clear that a *federal* claim was presented." *Adams, supra*, 117 S.Ct. at 1031, n. 3. (emphasis in original); *Bankers Life & Casualty Co. v.*

Crenshaw, 486 U.S. 71, 76-78 (1988); *Webb v. Webb*, *supra*, 451 U.S. at 501 ("At a minimum, . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.") (emphasis in original); *Bowe v. Scott*, 233 U.S. 658, 665 (1914) ("it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state constitution . . . and affords no basis whatever for invoking the jurisdiction of this court.")

Fifth, petitioners treated the indispensable party issue below as one solely of state law. Their opening brief in the court of appeal stated that the "sole issue" on appeal is whether the United States is an indispensable party "under the statutory definition of Code of Civil Procedure § 389." *Supra*, p. 2. Their petition for review in the California Supreme Court also framed the issue as whether it was an "abuse of discretion" to dismiss the action because of the inability to join the Bureau, and the only rights allegedly infringed as a result of such a dismissal were state law rights to a judicial hearing under the California Water Code and California Environmental Quality Act. *Supra*, pp. 4-5.

Moreover, petitioners conceded below that the Bureau enjoyed sovereign immunity, and could not be joined in this action. Petitioners' memorandum in the superior court stated:

> "The doctrine of sovereign immunity protects the United States from suit, except where it consents thereto. [citation omitted] In the matter at hand, it appears that no express statute authorizes a lawsuit against the United States regarding the water rights permits issued to the United States by [the SWRCB]. As such, the United States is not subject to jurisdiction of the State courts and cannot be served in this action." CT 1294.

Petitioners' Opening Brief in the court of appeal also stated:

> "it does not appear that the United States is subject to the jurisdiction of the state courts in this case." Br. at 11, l. 12-14.

Petitioners' brief went on to state:

> "The doctrine of sovereign immunity protects the United States from suit, except where it consents thereto. [citation omitted] In the matter at hand, it appears that no express statute authorizes a lawsuit against the United States regarding the water rights permits issued to the United States in state court by [the SWRCB]. Moreover, even under the unique circumstances presented here . . . it does not appear that the United States can be joined in this action." *Id.* at 22-23.

Thus, petitioners conceded that the Bureau was entitled to sovereign immunity but argued that the action should be allowed to proceed without the Bureau. Petitioners never raised the issue of any federal constitutional or statutory restrictions upon indispensable party determinations under state law, nor did they challenge the United States' sovereign immunity. In these circumstances, where no federal law claim was made against the application of state law, the Court should decline review of any subsequently proffered federal questions. See *Zadig v. Baldwin*, 166 U.S. 485, 486-488 (1897) (where validity of state law was assumed during state court proceedings, no Supreme Court jurisdiction to consider later federal constitutional challenge to state law).

II. NONE OF THE FEDERAL QUESTIONS IN THE PETITION ARE SUBSTANTIAL ENOUGH TO MERIT REVIEW BY THIS COURT

1. It is well-established that if the United States is an indispensable party and has not waived sovereign immunity, the action must be dismissed. See e.g., *California v. Arizona*, 440 U.S. 59, 61-63 (1979); *Texas v. New Mexico*, 352 U.S. 991 (1957); *Arizona v. California*, 298 U.S. 558, 568-572 (1936); *Minnesota v. United States*, 305 U.S. 382, 386-388

(1939); *Morrison v. Work*, 266 U.S. 481, 485-486 (1925). The essence of the questions in the Petition is whether "due process" or "equal protection" or section 8 of the Reclamation Act somehow modify this principle by either: (1) waiving the sovereign immunity of the United States and allowing it to be joined without its consent; or (2) allowing petitioners' action to proceed even if the United States is an indispensable party that will be prejudiced. There is no need to grant review in this case to summarily reject either of these arguments. Particularly when petitioners conceded below that the United States was immune from suit, and where petitioners have an alternative federal court remedy against the Bureau under section 8 of the Reclamation Act, this case would be a poor vehicle to consider any questions about the United States' sovereign immunity.

2. There is no need to resolve any split among the federal courts of appeals over the standard of review for indispensable party determinations under Fed.R.Civ.Pro. 19(b). The standard of review has no effect upon the outcome of this case. The United States is clearly an indispensable party in this action which seeks to invalidate terms and conditions of the Bureau's water right permits, and drastically change the way that the Bureau can operate the CVP. Under either a *de novo* or abuse of discretion standard, the Superior Court's judgment of dismissal would be affirmed.

Moreover, the overwhelming weight of federal authority is that indispensable party determinations under Fed.R.Civ.Pro. 19(b) are reviewed under an abuse of discretion, not a *de novo* standard. See *Thunder Basin Coal Co. v. Southwestern Public Service Co.*, 104 F.3d 1205, 1210 (10th Cir. 1997); *HB General Corp. v. Manchester Partners, LP*, 95 F.3d 1185, 1190 (3rd Cir. 1996); *Burka v. Aetna Life Insur. Co.*, 87 F.3d 478, 483 (D.C.Cir. 1996); *Pembina Treaty Committee v. Lujan*, 980 F.2d 543, 545 (8th Cir. 1992); *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel Known as the Sindia*, 895 F.2d 116, 121 (3rd Cir. 1990); *Travellers Indemnity Co. v. Dingwell*, 884 F.2d 629, 635 (1st Cir. 1989); *Icon Group, Inc. v. Mahogany Run Development Corp.*, 829 F.2d 473, 476 (3rd Cir. 1987);

CloverLeaf Standardbred Owners Assn. v. National Bank of Washington, 699 F.2d 1274, 1276-1277 (D.C.Cir. 1983); *Walsh v. Centeio*, 692 F.2d 1239, 1241-1243 (9th Cir. 1982); *Bakia v. Los Angeles County*, 687 F.2d 299, 301 (9th Cir. 1982). In fact, only the Sixth Circuit decision in *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341 (6th Cir. 1993) appears to have taken a contrary position.

Even if the California court of appeal erred by following the weight of federal precedent, that would have little impact on other federal courts which are unlikely to rely upon a California court of appeal decision construing Code of Civil Procedure section 389(b) as precedent for Fed.R.Civ.Pro. 19(b).

Indispensable party determinations also are fact-intensive, and dependent upon the particular circumstances of each case. To use up this Court's limited docket with cases like this which are fact-driven, and which involve discretionary judgments by the trial court is unwarranted. The indispensable party determination and resulting dismissal of the action did not affect the assertion of any federal rights because petitioners' substantive claims in its state court complaint against the SWRCB were based upon state rather than federal law.

3. Petitioners have an alternative federal court remedy under section 8 of the Reclamation Act by which they can assert against the Bureau all of their substantive state law claims concerning the control, appropriation, use, and distribution of CVP water. The superior court found that petitioners' *Stockton East* federal court suit was an adequate alternative remedy. This Court customarily accepts factual findings of state trial courts absent exceptional circumstances. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980); see also *Hernandez v. New York*, 500 U.S. 352, 366 (1991); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). Petitioners' *Central Delta* federal court suit against the individual members of the SWRCB also affords petitioners a federal court remedy for any claims of an alleged denial of federal due process in the SWRCB water right

proceeding. Thus, the assumption in the Petition that petitioners have no federal or state court remedy by which they can challenge the SWRCB's water rights order and the Bureau's CVP operations is factually incorrect.[3/]

Petitioners have used the SWRCB as a surrogate for the Bureau in this litigation. Their state court action sought to compel the SWRCB to change the Bureau's water right permits; to bring enforcement actions against the Bureau to force it to change CVP operations; and to rule in future water right proceedings that the Bureau must provide petitioners with more water. (CT 1-64). In their dispute with the Bureau over New Melones water, petitioners want two bites of the apple: they want to bring one lawsuit directly against the Bureau in federal court under section 8 of the Reclamation Act, and a second suit against the SWRCB in state court as a surrogate for the Bureau.

This case is about due process and fairness, but it is mainly about due process and fairness for absent parties. Because the interests of the United States would be seriously and adversely affected by this action, the United States must be joined as a party. Because the United States has declined to waive its sovereign immunity in state court, there is no alternative but to dismiss the action. As Justice Holmes said long ago, the rights of the United States "cannot be tried behind its back." *Louisiana v. Garfield*, 211 U.S. 70, 78 (1908).

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3. The SWRCB also disputes petitioners' portrayal of the nature of the Principles for Agreement, Pet. 22-24, and the relationship between the Bureau's operation of the CVP and the Department of Water Resources' operation of the State Water Project, Pet. 24, 29.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
CHARLES W. GETZ, IV
Assistant Attorney General
CLIFFORD T. LEE
LINUS MASOUREDIS
(Counsel of Record)
Deputy Attorneys General

Attorneys for Respondents, the State Water Resources Control Board and Its Members

November, 1997